

THE RESTORATION OF COMPULSORY UNIONISM

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THE BACKGROUND TO THE LEGISLATION

There has been a long-standing assumption that union membership will be required of most private sector workers in New Zealand. This assumption was sharply reversed in 1983, when the National Government of the day introduced voluntary unionism. In the following year the newly-elected Labour Government introduced legislation restoring compulsory unionism, the Industrial Relations Amendment Act 1985, which finally took effect on July 1 1985. These developments crystallised the arguments both for and against compulsory union membership and the debate was extended with the introduction of the draft Bill of Rights, which provided for freedom of association¹, and the discussion following the Green Paper "Industrial Relations: A Framework for Review".² The union membership debate raises issues of considerable complexity. At one end of the discussion, tension arises between the contrasting demands of individual and collective interests. At the other extreme, there is disagreement as to the practical effect either of the forms of union membership will have upon individual workers or upon the performance of industrial unions. Even where the protagonists in the debate find themselves in rare agreement as to the result of imposing either of the alternatives, for example the inevitable weakening of union power under a regime of voluntary unionism, differences remain as to whether that result is desirable.

Like most issues turning on competing social interests, the questions of principle posed by the union membership debate are heavily laden with values. Those in favour of voluntary unionism tend to emphasise the personal freedom of the individual. Those who support compulsory unionism usually begin from the standpoint of the collective interests of organised labour and its relation with capital. Before considering the 1985 amendments in detail, we may briefly summarise the arguments on each side.

Underlying the decision to introduce voluntary unionism in 1983 was the suggestion that:

"...a law to remove an individual's basic freedom of choice on whether to join, or not to join, an organisation must be supported by powerful argument and compelling reason..."³

and that no such reasons existed: compulsory unionism was "a clear infringement of human freedom"⁴ and "a clear form of discrimination in the workplace".⁵ It was argued that the implementation of voluntary

¹ "A Bill of Rights for New Zealand", A.J.H.R. A6, 1985, 82.

² Wellington, Government Printer, 1986. See also the *Summary of Submissions*, Wellington, Government Printer, 1986.

³ The Hon. J.B.Bolger, "Reasons for Voluntary Unionism in 1983", in P.Brosnan (ed.) *Voluntary Unionism*, Industrial Relations Centre, V.U.W., 1983.

⁴ *Ibid.*, 24. A point made also by A.E.C.Hare, *Industrial Relations in New Zealand*, Wellington 1946, 318.

⁵ The Hon. J.B.Bolger, speech notes, Address to the Auckland Chamber of Commerce, 17 August 1983.

unionism would enable the New Zealand government to ratify various international conventions embodying the right to freedom of association, notably I.L.O. Conventions 87 and 98.⁶ In the context of the draft Bill of Rights, it was alleged by the New Zealand Employers' Federation that any right to freedom of association should entail a corresponding "negative right" not to belong to a union.⁷

The remaining arguments advanced in favour of voluntary unionism were more pragmatic. It was suggested that compulsory unionism had led to apathetic membership and to union officials who, being guaranteed that membership, took few steps to develop union services to members or to encourage participation in union activities.⁸ The allegation was made that compulsory membership enabled militant union officials to pursue industrial policies with which many of their members disagreed.⁹ Unions which enjoyed the benefit of compulsory union membership were also seen to be protected from the economic consequences of their actions.¹⁰

Finally, and perhaps most importantly, the implementation of voluntary unionism took place in the context of proposals for a radical reorganisation of the New Zealand economy. Many of the changes proposed by the then National Government were opposed by the union movement, which was seen by the government as lacking "innovative thinking" on such issues as labour market flexibility.¹¹ A weakening of union power as a consequence of voluntary unionism was seen as desirable in the interests of hastening change in areas such as technology and shift work.¹² In summary, the increasing influence of neo-classical economists led to calls for a reduction in rigidities and institutional barriers in the labour market and a weakening of the relative bargaining power of organised labour.¹³

The principal argument raised in favour of compulsory unionism was

⁶ Ibid. Subsequently the Minister of Labour retreated from this argument, since ratification of Convention 87 would entail loss of the power to deregister unions. See generally G.A.Anderson and P.Brosnan "Freedom of Association: New Zealand Law and I.L.O. Convention 87" (1984) NZLJ 307 and G.A.Anderson, "International Labour Standards and the Review of Industrial Law" (1986) NZJIR 27.

⁷ J.W.Rowe, "Implications of Voluntary Unionism: the Employers' Perspective", in Brosnan, op. cit., at 28. This represented a marked change in attitude by employers, who had vigorously opposed voluntary unionism in 1961 (see N.S.Woods, *Industrial Conciliation and Arbitration in New Zealand*, Wellington, 1963, at 195) and in 1975 (see the Federation's *Annual Report, Employer*, No.25, Nov.1975). In 1974 a research paper circulated by the Employers' Federation, "Preference of Employment for Members of Unions", argued that the ethical questions in the debate were "probably not the concern of employers".

⁸ Bolger, op. cit., and Rowe, op. cit. See also Hare, op. cit., at 195 et seq. and 318-319, and Woods, op. cit., at 193. This view was advanced also by some union officials, as it had been when earlier debates on voluntary unionism had taken place: see Hare, idem.

⁹ The Hon. J.B.Bolger, 1983 N.Z.Parl.Deb. 2459. The introduction of voluntary unionism took place against the background of a campaign of strikes against the wage freeze then in force. The government of the day alleged that the industrial action was contrary to the wishes of many of the participants.

¹⁰ *Industrial Relations: A Framework for Review - Summary of Submissions*, 13.

¹¹ Bolger, op. cit.

¹² Ibid.

¹³ J. Boston, *Incomes Policy in New Zealand*, V.U.W., 1984, 268. Ironically, these changes were minor compared with the sweeping deregulation of the manufacturing, agricultural and financial sectors subsequently carried out by the incoming Labour Government which nevertheless favoured compulsory unionism, an apparent contradiction not lost on the proponents of voluntary unionism.

the need for an equilibrium of power in industrial relations.¹⁴ The right to collective freedom of association, it was argued, could only be exercised in the industrial arena through effectively-organised, financially-viable, unions with a strong membership.¹⁵ In particular, compulsory union membership was said to "provide protection for vulnerable groups from exploitation and victimisation (such as women workers and those in small or scattered workplaces)".¹⁶ It was argued that the balance of power within the union movement was also affected: compulsory membership was seen as leading to a preponderance of "moderate" unions whose block vote at union conferences avoided undue industrial militancy. The system was also convenient for employers, since it provided one "bargaining unit" in the course of negotiations. Individual freedom of choice, stressed by the proponents of voluntary unionism, was said to be adequately catered for by the right to exemption on grounds of conscientious objection, the obligatory three-yearly ballots on the inclusion of the union membership clause, the right to attend union meetings and the long-standing right not to pay "political" levies.¹⁷

Further, it was argued that workers who left unions would significantly disadvantage those who remained, by weakening the union's bargaining power, and in the longer term this effect would spread as stronger unions opted for independent bargaining, thus weakening the national award system itself and undermining horizontal relativities.¹⁸ Whilst abandoning their union, workers who resigned would nevertheless continue to enjoy the benefits which the union had negotiated. This issue - that of "free riders" - underpinned much of the debate on voluntary unionism. Professor Young sums up the issue in these terms:¹⁹

"Collective bargaining determines the terms and conditions of the whole work force covered by the agreement. The union represents the workforce in negotiating the agreement. All who benefit from the negotiations ought to contribute to their cost. Refusing to make such financial contributions is regarded as "free-riding" at the expense of one's fellows. As such it is but one step removed from scabbing (strike breaking)."

It can be seen that the issue of "free-riders" raises questions both of principle and of practicality. At the level of principle, it was seen as unfair to expect union members to bear the cost of obtaining improvements in wages and conditions that benefit all workers covered by awards, whether or not those workers were union members: that "those who gain should share in the cost of that gain".²⁰ More pragmatically, it was recognised that "free-riders" constituted an emotive issue in industrial relations and

¹⁴ Human Rights Commission, *Membership of Unions and the Right to Freedom of Association*, March 1985, 8.

¹⁵ *Ibid.*

¹⁶ *Summary of Submissions*, op. cit. The fears prompting this point of view were borne out by developments after the imposition of voluntary unionism: see R. Harbridge and P. Walsh, "Legislation Prohibiting the Closed Shop in New Zealand: Its Introduction and Consequences", unpublished paper, 1985.

¹⁷ See M. Wilson, "Union Membership in New Zealand: An Assessment of Government Policy" (1976) NZJIR 9.

¹⁸ See K.G. Douglas, "Implications of Voluntary Unionism: The Union Perspective" in Brosnan, op.cit.

¹⁹ *Union Membership*, Industrial Relations Centre, V.U.W., 1976, 10.

²⁰ *Summary of Submissions*, op. cit.

a fruitful source of conflict in the workplace.²¹ Theoretically attractive solutions to the problem, such as the formation of societies by non-unionised workers to negotiate their own conditions, or the payment of a levy by such workers to compensate unions for the cost of bargaining on their behalf, were seen to be inconsistent with the existing industrial framework.²²

THE LEGISLATION OUTLINED

Introducing the 1985 amending legislation to Parliament, the Minister of Labour described the new system as having five broad features:²³

1. Legislation inserted a non-negotiable union membership clause into all awards and agreements for a period of 18 months from 1 July 1985. This clause required all workers covered by an award or collective agreement to become and remain union members as a condition of employment.
2. Within eighteen months of the enactment of the legislation, ballots were to take place on the retention of the union membership clause, to test workers' opinion on the requirement to join a union. Subsequent ballots were to be required at 3-yearly intervals in order to retain or to restore the union membership clause.
3. A procedure was introduced to enable persons to be exempted from union membership on grounds of conscientious objection or other deeply held personal belief.
4. A discrimination provision made it an offence for employers or unions to discriminate on the basis of union membership or non-membership of a union. Nor were benefits to be conferred on workers because of their membership or non-membership of a union.
5. Statutory power of enforcement of the union membership clause was to be the responsibility of the union.

We can now turn to the detailed provisions of the legislation.

THE TRANSITIONAL PERIOD

The reintroduction of preference as from July 1 1985 caused practical problems. With the introduction of voluntary unionism all existing unqualified preference clauses had been deemed to be of no effect as from February 1 1984.²⁴ The Labour Government had undertaken to provide for internal ballots on union membership. Yet the implementation of those ballots, without more, would clearly delay further the effective commencement date of union membership clauses which (under the old system of unqualified preference) could have been negotiated into industrial instruments in the following September. Further, the Government was

²¹ Again, a fear borne out by the aftermath of voluntary unionism. See the strike statistics presented in Harbridge and Walsh, op. cit.

²² At this point the argument becomes circular, since the rigid structure of union recognition is opposed by most of the interest groups who favour voluntary unionism. See, for example, New Zealand Employers' Federation, *The Industrial Relations Green Paper: An Employer Perspective*, 1986, and the New Zealand Business Round Table, *New Zealand Labour Market Reform*, 1986.

²³ The Hon.S. Rodger, 1984 N.Z. Parl. Deb. 2791.

²⁴ Industrial Relations Amendment Act 1983, s.5, substituting the now-repealed s.100(2) of the Industrial Relations Act 1973.

committed to allowing a "breathing space" in which unions could repair some of the perceived damage done by voluntary unionism to their morale and internal organisation, before facing a compulsory ballot amongst their members.²⁵ The legislative solution was two-fold. Union membership clauses were deemed to be contained in industrial instruments registered under the 1973 Act for a period of 18 months beginning on July 1 1985. Thereafter the inclusion of such clauses depended upon an internal ballot.²⁶ The transitional period has now expired, although argument still continues concerning the compatibility with freedom of association of a legislatively-imposed period of compulsory unionism.²⁷

BALLOTS ON THE UNION MEMBERSHIP CLAUSE

Opponents of the repeal of voluntary unionism based many of their arguments on the allegedly undemocratic nature of compulsory union membership. In order to meet these arguments, the government included in the amending legislation provisions under which the obligation to belong to a union would depend upon regular ballots. Ballots had, of course, been a controversial feature of the previous government's industrial relations legislation, being fiercely opposed both by the trade unions and the then Labour opposition.²⁸ Under s.99 of the Industrial Relations Act 1973²⁹ mandatory rules relating to ballots on the union membership clause are deemed to be included in the rules of unions registered as at July 1 1985 and must be included in the rules of unions which register after that date. The rules must not be amended by the union and they prevail over any other provision of the rules.³⁰ Ballots under s.99 fall into two classes: "retention ballots", in respect of industrial instruments which currently include a union membership clause, and "restoration and initial ballots", in respect of industrial instruments which do not currently include such a clause.

Due to the transitional provisions of the 1985 amending legislation, initially most unions were faced with the retention ballot. In practice such ballots must be conducted every three years. Under s.99, those eligible to vote in such a ballot are the "appropriate financial members of the union".³¹

²⁵ The introduction of voluntary unionism had taken place during a wage freeze. This, combined with the removal of a union's ability to negotiate preferential redundancy agreements for their members and the removal of union "monopoly" over personal grievances, was seen as destroying the most powerful material incentives to belong to a union by withdrawing from unions the ability to service their members in traditional areas.

²⁶ The transitional provision was contained in s.17 of the Industrial Relations Amendment Act 1985.

²⁷ The removal of voluntary unionism prompted a partially successful complaint by the New Zealand Employers Federation to the International Labour Organisation in June 1985. The Freedom of Association Committee of the ILO held that the manner in which compulsory union membership clauses were imposed during the period of 18 months from 1 July 1985 was not in conformity with the principle that workers should be able to form and join organisations of their own choosing. The Committee did not consider the concept of industry-wide ballots for union membership clauses to be contrary to principles of freedom of association (*Employer*, August 1986).

²⁸ N.S.Woods, "Why Laws Like This?" (1977) NZLJ 352.

²⁹ Inserted by s.4 of the Industrial Relations Amendment Act 1985.

³⁰ Industrial Relations Act 1973, s.99(1).

³¹ Section 98 defines such members as the financial members of the union who are bound by an award, collective agreement or determination by which members of the union are bound.

The committee of management of the union must ensure that steps are taken to publicise the pending ballot, to discuss it at a special meeting and to conduct the secret ballot amongst appropriate financial members.³² The majority of recorded votes stands.³³ The ballot must be conducted under the supervision of the Registrar of Industrial Unions or by a designated officer of the Department of Labour.³⁴

The retention ballot operates where a union membership clause is already contained in the relevant agreements. What if the agreements do not contain such a clause but the union wishes to introduce one? Two examples will occur in practice, and both are covered by the mandatory union rules introduced by s.99. First, the union may not previously have been party to industrial instruments containing union membership clauses. Here s.99 requires an initial ballot to be held. Secondly, the union may have been party to instruments containing a union membership clause but that clause may have been removed either as the result of an unfavourable ballot or because it has been allowed to “lapse”: here the union will require the clause to be re-inserted. In this case the union must conduct a restoration ballot under s.99. The rules relating to the conduct of initial ballots and restoration ballots are identical and differ significantly from those applying to retention ballots. In particular, those entitled to vote at meetings called to discuss initial and restoration ballots include not only the financial members of the union but also those workers who are not union members but who will be bound to become union members if a union membership clause is inserted in the relevant industrial instruments. The committee of management must take all reasonably practicable steps (including newspaper advertising) to ensure that these non-members are made aware of the ballot and of the procedure by which they become eligible to vote and, further, that committee must ensure that non-members are given a reasonable time within which to comply with the technical prerequisites for voting.³⁵ The 1973 Act provides detailed complaint procedures in relation to irregularities in the conduct of ballots, which may give rise to an inquiry by the Registrar of Industrial Unions and, ultimately, a referral to the Arbitration Court.³⁶

Certain standard provisions applying to the three species of ballot are inserted into union rules by s.99 of the 1973 Act. Of these, the most important is the restriction on the frequency of ballots: the union must not conduct a ballot under its rules if the Registrar of Industrial Unions has issued a certificate showing the result of an earlier ballot during the two years preceding the date on which the proposed ballot is to be conducted. This provision must be read together with s.100(1) of the 1973 Act which states

³² For the purposes of this rule, the term “special meeting” includes any meeting of the appropriate financial members of the union residing or working in any particular locality, “being a meeting called expressly for the purpose of considering whether a union membership clause should be included in each of the awards and in each of the collective agreements by which members of the union are bound from time to time” (Industrial Relations Act 1973, s.99).

³³ The view of the majority is represented by the majority of the valid votes cast in the secret ballot, including special votes (*ibid.*). The ballot form is set out in Form 4 in Schedule 1B in the 1973 Act.

³⁴ For the Department’s internal guidelines, see Department of Labour Circular No 908, 1985, H.O. 46/3/66. For the form of notice to the Registrar, see Form 3 in Schedule 1B in the 1973 Act.

³⁵ In form 1 in Schedule 1B in the 1973 Act.

³⁶ See the Industrial Relations Act 1973, ss.102C - 102G.

that, where a ballot favours the insertion or retention of a union membership clause, the clause will continue to be inserted in each of the relevant industrial instruments for a period of three years.³⁷ The remaining standard provisions are mechanical rules relating to returning officers and special votes.

The ballots are supervised by the Registrar of Industrial Unions who must be given at least thirty days notice of the relevant special meetings³⁸ and the 1973 Act sets out detailed procedural rules relating to the conduct of the ballot, and to offences and inquiries, which need not be elaborated here.³⁹ Once a ballot on the union membership clause has been conducted under the 1973 Act, it relies for its implementation on a certificate from the Registrar of Industrial Unions. Under s.102B of the 1973 Act, such a certificate can only be issued once every three years on the basis of a majority vote of the relevant workers. The Arbitration Court must, where necessary, make the required consequential amendments to the award or agreement and ensure that the application of the clause is clearly set out in the relevant instrument.⁴⁰

THE SCOPE OF THE UNION MEMBERSHIP CLAUSE

Under s.98 of the Industrial Relations Act 1973, inserted by the 1985 amending legislation,⁴¹ a union membership clause means a clause which provides that:

"If any adult person (other than a person who holds a certificate of exemption from union membership issued under section 1120 of the Industrial Relations Act 1973) who is not a member of a union of workers bound by this award (or agreement) is engaged or employed by any employer bound by this award (or agreement), the person shall become a member of the union within 14 days after that person's engagement or, as the case may require, after this clause comes into force, and shall remain a member of the union so long as that person continues in the position or employment."

In effect, the union membership clause is the unqualified preference clause under a different name. For the purposes of the clause "adult person" means a person of the age of eighteen years or upwards or a person of any age who is receiving not less than the minimum rate of wages or salary payable to an eighteen year old or to a person over that age.⁴² A union membership clause may be inserted in an industrial instrument only in accordance with the provisions of the 1973 Act,⁴³ upon which it takes effect according to its tenor.⁴⁴ Union members are not entitled to preference in obtaining or retaining employment by reason of their membership of a union, except for the preference conferred by a union membership clause⁴⁵ and, reinforcing

³⁷ Statistics have yet to be published on ballot results. For the results of earlier ballots, see J.M.Howells, "For or Against Compulsory Unionism: Recent Ballots in New Zealand" (1983) *International. Lab. Rev.* 95.

³⁸ Industrial Relations Act 1973, s.102. The appropriate form is Form 3 in Schedule 1B in the 1973 Act.

³⁹ *Ibid.*, s.102A. The form of the ballot paper is prescribed by Form 4 in Schedule 1B in the 1973 Act.

⁴⁰ Industrial Relations Act 1973, s.101. For the certificate, see Form 5 in Schedule B in the 1973 Act. Union amalgamations attract special rules under ss.101D and 101C.

⁴¹ Industrial Relations Amendment Act 1985, s.4.

⁴² *Ibid.*, s.98.

⁴³ *Ibid.*, s.98A(1).

⁴⁴ *Ibid.*, s.98A(2).

⁴⁵ *Ibid.*, s.98A(3).

this qualification, such preference is declared not to be an “industrial matter” and hence not able to be negotiated.⁴⁶ No industrial instrument (including an agreement filed under s.141 of the 1973 Act⁴⁷) may contain a provision requiring any worker to join a union other than a union membership clause inserted in accordance with the provisions of the 1973 Act.⁴⁸

THE EFFECT OF THE UNION MEMBERSHIP CLAUSE

Where a union membership clause is inserted in an award or collective agreement, a worker to whom the union membership clause applies and who fails to become a member of the union after a request to do so from an authorised union representative is deemed to have committed a breach of award: failure to remain a member is likewise treated as a breach.⁴⁹ Employers bound by the award or agreement are deemed to commit a breach if they continue to employ any such worker.⁵⁰ The duty of seeing that the membership clause is complied with rests with the relevant union: neither the Department of Labour nor any Inspector of Awards is charged with the duty of enforcing observance of the union membership clause or any award provision requiring employers to supply employee lists.⁵¹

EXEMPTION FROM UNION MEMBERSHIP

Under the system of unqualified preference, workers who had a conscientious objection to union membership could apply for an exemption from the obligation to belong to a union. This right became redundant upon the introduction of voluntary unionism and it was repealed with the amending legislation of 1983. With the return of preference the right of conscientious objection was restored although the grounds of objection were broadened. Under s.112C of the 1973 Act, an application for exemption may be made on the grounds that:

“the applicant genuinely objects, on the grounds of conscience or other deeply held personal conviction, to becoming or remaining a member of any union whatsoever or of a particular union.”⁵²

Ironically, given the criticism directed at the “compulsory” aspects of the 1985 legislation, this definition was drawn from British legislation designed to curb the power of the closed shop in British industry by enabling more workers to opt out of that system.⁵³

A three-person tribunal known as the Union Membership Exemption Tribunal administers the system for union exemptions.⁵⁴ That tribunal, which is deemed to be a Commission of Inquiry,⁵⁵ consists of members recommended by the Minister of Labour having regard to their knowledge

⁴⁶ *Ibid.*, s.2 (definition of “industrial matter”).

⁴⁷ *Ibid.*, s.98A(5).

⁴⁸ *Ibid.*, s.98A(4).

⁴⁹ *Ibid.*, s.103(1).

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, s.103(2).

⁵² *Ibid.*, s.112C.

⁵³ The Employment Act 1980 (U.K.), s.58(4).

⁵⁴ Industrial Relations Act 1973, s.107.

⁵⁵ *Ibid.*, s.105(2).

and experience in human rights, religious beliefs and industrial relations.⁵⁶ The application procedure and the procedure and membership of the tribunal are fully set out in a number of mechanical sections and need not be elaborated.⁵⁷

The key legal question regarding exemption from union membership is the scope to be given to the stated grounds for exemption. What are "grounds of conscience" or "deeply held personal conviction" and how do such grounds differ from other states of mind? The Tribunal's decisions to date provide some guidelines. According to the Tribunal, the word "conscience" seems to imply:

"...a judgment between right and wrong, a moral stance, whether or not influenced by religious beliefs. The word 'conviction' implies a judgment which is not necessarily based on convictions of morality, but such considerations are not required to be excluded. On the other hand, a 'conviction' is not limited to a state of mind arrived at by a rational process, and still less a state of mind which is to be found reasonable on an objective basis."⁵⁸

It follows that the Tribunal is not concerned with the validity of the applicant's beliefs and that the steps taken by the applicant to verify his or her beliefs will usually be irrelevant. The reasons for that belief have been treated as relevant "only so far as they have probative value in establishing the existence of the grounds of conscience on which she relies, and in showing that this is the true basis of her objection to union membership".⁵⁹

An objection to compulsion in itself, or to being bound by an award, falls outside the grounds set out in s.112C. The objection must be to membership of any trade union or of a particular trade union.⁶⁰ In order to satisfy the Tribunal that he or she is objecting to union membership, the applicant must show that membership would place "some burden" on him or her, or operate in some way to his or her detriment involving suffering "in some special way".⁶¹ Thus applications have failed where the ground of objection is the belief that there is no need for union membership⁶² or where the objection is simply to an obligation falling on all members, such as the duty to pay union fees.⁶³ As a corollary, objections to union membership are not called into question simply because the applicant, if exempted, would continue to benefit from union activities such as the renegotiation of awards.⁶⁴

Objections have been upheld where they related, inter alia, to the political affiliation of a particular trade union, or of trade unions in general⁶⁵; where the applicant objected to strike action as an industrial tactic⁶⁶; where "professional standards of conduct" were seen as incompatible with union

⁵⁶ *Ibid.*, s.107(2).

⁵⁷ *Ibid.*, ss.108-112A.

⁵⁸ *Lawson*, unreported, 9 December 1985, UMET 4/85.

⁵⁹ *Bruce*, unreported, 9 December 1985, UMET 2/85. Cf. *Brockie*, unreported, 1 May 1986, UMET 38/86, and *Te Groen*, unreported, 23 December 1985, UMET 42/85.

⁶⁰ *Summers*, unreported, 9 December 1985, UMET 1/85. This decision sets out at length the Tribunal's general approach to such applications.

⁶¹ *Saunders*, unreported, 7 April 1986, UMET 10/86.

⁶² *Crosbie*, unreported, 1 May 1986, UMET 39/86.

⁶³ *Saunders*, n.61 above.

⁶⁴ *Long*, unreported, 7 April 1986, UMET 9/86.

⁶⁵ *Spiera*, unreported, 7 April 1986, UMET 4/86.

⁶⁶ *Rulkens*, unreported, 23 December 1985, UMET 45/86.

membership⁶⁷; where union membership would conflict with the applicant's religious beliefs⁶⁸; where the objection was to the "wrongness of union attitudes" towards collective bargaining⁶⁹; where the applicant objected to "abuse of power" by union delegates⁷⁰; and where the ground of objection was a conviction that the union was not looking after the applicant's interests.⁷¹ It is no answer to such applications that union rules provide alternative mechanisms for settling grievances against the relevant union.⁷²

COMPULSORY UNIONISM AND THE BILL OF RIGHTS

Clause 14 of the proposed New Zealand Bill of Rights states that:

- "1. Everyone has the right to freedom of association.
2. This right includes the right of every person to form and join trade unions for the protection of that person's interests consistently with legislative measures enacted to ensure effective trade union representation and to encourage orderly industrial relations."

The clause has proved to be controversial, largely because it omits any reference to a "right" not to belong to a trade union. The argument in the White Paper that "the so-called 'negative freedom' - the freedom not to join a union - is not necessarily implied in the guarantee of the freedom to form and join trade unions" has frequently pre-occupied courts in Europe where similar problems arise in reconciling the "closed shop" with freedom of association under the European Convention on Human Rights and under national constitutions.⁷³ The competing viewpoints are well-demonstrated in *Young, James and Webster v United Kingdom*, a case challenging the British "closed shop" under the European Convention.⁷⁴ In that case, an analysis of the majority opinion of the European Commission clearly discloses an underlying assumption that a right to associate necessarily has as its logical corollary a right not to associate.⁷⁵ Against this, three dissenting judges held that the positive and negative aspects of freedom of association were quite separate and Judge Evriginis took the view that trade union freedom cannot be regarded as "no more than a general and individualistic concept of freedom of association", but is to a large extent determined by its character as a collective right, and that this collective right must be balanced against individual interests.⁷⁶ Although the purely semantic issue presented by any "negative right" in New Zealand will rest on the same considerations, in considering the wider issues we must not overlook the considerable differences between the union membership system

⁶⁷ *Thomas-Lewis*, unreported, 7 April 1986, UMET 8/86.

⁶⁸ *Bruce*, unreported, 9 December 1985, UMET 2/85.

⁶⁹ *Robinson*, unreported, 9 December 1985, UMET 5/85.

⁷⁰ *Ibid.*

⁷¹ *Allerby*, unreported, 23 December 1985, UMET 44/85, citing *Home Delivery Service Ltd. v Shackcloth* [1985] ICR 147.

⁷² *Hatcher*, unreported, 7 April 1986, UMET 15/86.

⁷³ There is an immense literature available. See generally F. von Prondzynski "Freedom of Association and the Closed Shop: The European Perspective" (1982) 41 CLJ 236.

⁷⁴ [1981] I.R.L.R. 480. See von Prondzynski, *ibid.* Also Duffy (1980) Human Rights Review 205 and (ed.) 1981 Human Rights Review 133; O'Higgins (1981) Human Rights Review 22; Drzemczewski and Wooldridge (1982) I.C.L.Q. 396; Shea (1982) 15 Cornell International Law Journal and C. Hanson et al., *The Closed Shop*, London 1982.

⁷⁵ Von Prondzynski, *op. cit.*

⁷⁶ *Op. cit.*, n.2.

in New Zealand and the "closed shop" in Europe. In particular, the existence in New Zealand of a broad right of "conscientious objection", the provision for three-yearly ballots and the right to "opt out" of political levies. It might also be noted that continental trade unions are often ideologically pluralistic so that the issue raised when, say, a Catholic is forced to join a Communist trade union, becomes an issue of freedom of conscience as well as freedom of association.⁷⁷ Such marked differences cast considerable doubt on the direct applicability of European case-law, notwithstanding the similarity in drafting of the relevant clauses.⁷⁸

It can be seen, then, that in construing the "freedom of association" clause in the proposed New Zealand Bill of Rights the courts will have to address a number of thorny questions. These include whether a correlative right not to associate stems from the positive right of free association, what corresponding right (if any) might exist in union members to refuse to associate with non-members, whether a person can be said to "waive" any right not to associate by taking a job knowing of union coverage (or, alternatively, whether the essential claim in this situation is effectively to a "right to work" not covered by the Bill of Rights), and the broader issues presented by the reference to "effective trade union representation" and the encouragement of orderly industrial relations. Clause 3 of the proposed Bill states that the rights and freedoms in the Bill may be subject only to such reasonable limits as can be demonstrably justified in a free and democratic society, and the question may ultimately arise whether compulsory unionism may be so justified.⁷⁹

THE GREEN PAPER EXERCISE

Question 6 of the Green Paper⁸⁰ asked for submissions on the most appropriate approach for determining compulsory union membership. The Summary of Submissions⁸¹ revealed a deep division between those who wished for the removal of compulsory unionism (predominantly employers) and those who wished that system to be maintained (predominantly unions). Several suggestions were made by those in the latter group for mechanical changes to the ballot procedures. Some employers favoured the approach under unqualified preference, whereby the question of union membership was a negotiable matter. The Government's *Policy Statement on Industrial Relations*⁸² indicates that this last approach will be restored in the anticipated Labour Relations Act, which will supersede the Industrial Relations Act 1973. Whether union membership is compulsory or voluntary will be, in the first instance, a negotiable matter. If the parties to an award or agreement cannot agree, then a secret ballot of union members will follow on a similar basis to the present arrangements, except that it will be award-based and not union-based. The insertion of a union membership clause will then depend on a simple majority of votes cast and the existing exemption

⁷⁷ See Lord Wedderburn in Duffy (ed.), n.2.

⁷⁸ See A. Frame, "Freedom of Association and New Zealand Industrial Law" (1985) 15 VUWLR 64.

⁷⁹ See generally P. Risworth, "Reasonable Limits on Fundamental Freedoms", (1986) AULR 340.

⁸⁰ Note 2 above.

⁸¹ Ibid.

⁸² Wellington, Government Printer, September 1986.

procedures will continue. The results of the ballot will have an effective life of three documents.

The proposals in the Government's policy statement herald a return to unqualified preference in all but name. Yet it would be unwise to assume that the results of conciliation once union membership becomes negotiable will reflect the usual outcome during the period when there was a broad measure of consensus between employers and unions on union membership policy. Industrial relations commentators point to a new mood of militancy on the part of employers, fuelled by the "free market" thinking which pervades the New Zealand economy under the present government. Provision for compulsory unionism, once a foregone conclusion, may now become a powerful bargaining counter in the negotiation of some awards.